

A **IN RE GAN ENG SAN;**
 EX P HSBC BANK MALAYSIA BHD

 HIGH COURT MALAYA, KUALA LUMPUR
 MAH WENG KWAI JC
B [BANKRUPTCY NO: D3-29-2223-2007]
 11 OCTOBER 2010

C ***BANKRUPTCY:*** *Adjudication and receiving orders - Setting aside - Whether grant of AO/RO premature - Whether an act of bankruptcy was committed by judgment debtor - Whether creditor's petition properly filed - Bankruptcy notice - Whether valid - Whether judgment debtor able to pay debt within meaning of s. 6(3) Bankruptcy Act 1967 - Whether AO/RO ought to be annulled*

D Adjudication and Receiving Orders (AO/RO) were granted by the Senior Assistant Registrar (SAR) against the Judgment Debtor (JD) on the Creditor's Petition (CP) filed and presented on 12 March 2009. Dissatisfied with the AO/RO, the JD filed a Notice of Appeal to the judge in chambers. The JD submitted that the AO/RO ought to be set aside on the following grounds (i) that
E there had been no act of bankruptcy committed by the JD on 23 September 2008 in view of his pending appeal to the Court of Appeal against the decision of the learned judge given on 9 September 2009; (ii) that the presentation of the CP was
F premature as the CP filed and presented on 12 March 2009 was based on a disputed Bankruptcy Notice (BN) which was yet to be decided by the court as at the date of the presentation, and as such there was no act of bankruptcy committed by the JD within six months before the presentation of the CP and (c) that
G the JD was still able to pay his debt within the meaning of s. 6(3) of the Bankruptcy Act 1967 (BA).

Held (dismissing the appeal with costs):

H (1) The BN was served on the JD personally on 15 September 2008. The JD had a statutory period of seven days to respond. In order to avoid an act of bankruptcy being committed by 23 September 2008, the JD had either to settle the sum claimed in the BN to the satisfaction of the JC or to take action to set aside the BN within the seven days. The
I JD did not make any payment to the JC within the seven

days. The JD had filed summons in chambers to set aside the BN on 30 September 2008. However, the mere fact that the JD had filed the said summons in chambers would not operate to extend time for the JD to comply with the BN. Without an order for a stay of proceedings or an extension of time to comply with a statutory notice, the filing of a summons in chambers would not operate to stop time from running. Moreover, the JD had filed the summons in chambers after the expiry of the statutory seven day period and no explanation was forthcoming to explain the delay nor was there an application to extend the time for compliance with the BN. As the act of bankruptcy was committed by the JD on 23 September 2008, the filing of the CP on 12 March 2009, three months before the disposal of the summons in chambers to set aside the BN was heard by the SAR on 23 June 2009 was valid. The CP filed on 12 March 2009 was properly filed within six months from the act of bankruptcy committed on 23 March 2008. In light of the chronology of events, the hearing of the CP on 14 June 2010 and the grant of the AO/RO by the SAR were therefore not premature. (para 7)

- (2) The JD did not obtain any order for a stay of the bankruptcy proceedings pending his appeal to the Court of Appeal. It is trite law that an appeal does not operate to stay proceedings. The learned judge had held that the BN was valid as the service of the BN was proper and that the BN was in accordance with the judgment of 30 June 2005. Accordingly, the act of bankruptcy was committed on 23 September 2008. (para 7)
- (3) There were two reasons why the AO/RO ought not to be annulled (i) there was no evidence adduced in court by way of affidavit to show or to satisfy the court that the JD could pay the debt of RM3,342,208.41 as stated in the BN and (ii) on the hearing of the CP on 14 June 2010, the JD did not object to the granting of the AO/RO after the SAR had dismissed the JD's summons in chambers to set aside the CP. (para 7)

A Case(s) referred to:

J Raju M Kerpayya v. Commerce International Merchant Bankers Bhd [2000]
3 CLJ 104 CA (**refd**)

Natarajan Kuppusamy, Re [1992] 3 CLJ 1638; [1992] 3 CLJ (Rep) 111 HC
(**dist**)

B *Per Yap Kin ex parte United Malayan Banking Corporation Berhad* [1997]
3 CLJ Supp 56 HC (**dist**)

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 6(3), 105(1)

Bankruptcy Rules 1969, rr. 18(1), 95(1)

C *For the judgment debtor - Kalai Selvi PM Muthu; M/s Kamil Hashim Pury
& Lim*

For the judgment creditor - Anushka Chandra; M/s Skrine

Reported by Suhainah Wahiduddin

D

JUDGMENT

Mah Weng Kwai JC:

E [1] On 14 June 2010 adjudication and Receiving Orders (AO/RO) were granted by the learned Senior Assistant Registrar (SAR) against the Judgment Debtor (JD) on the Creditor's Petition (CP) filed and presented on 12 March 2009.

F [2] Being dissatisfied with the AO/RO the JD filed a notice of appeal to the judge in chambers on 22 June 2010 (encl. 32).

[3] Undisputed Chronology of Events

G (a) 30 June 2005 - Judgment in default of appearance was obtained by the JC.

(b) 9 August 2007 - JC issued Bankruptcy Notice (BN).

(c) 15 September 2008 - BN was served personally on JD.

H (d) 30 August 2008 - JD filed summons in chambers to set aside the BN.

(e) 12 March 2009 - JC filed and presented CP.

I (f) 23 June 2009 - SAR dismissed JD's summons in chambers to set aside BN.

- (g) 21 August 2009 - JD filed summons in chambers to set aside the CP. A
- (h) 9 September 2009 - Appeal to judge in chambers against the order of SAR dismissing the application to set aside the BN dismissed by Zaharah binti Ibrahim J (now JCA). B
- (i) 8 October 2009 - JD filed Notice of Appeal to Court of Appeal against the decision of Zaharah binti Ibrahim J (now JCA). C
- (j) 14 June 2010 - SAR dismissed JD's Summons in Chambers to set aside the CP AO/RO granted. D

[4] Grounds Of Appeal By The JD

The counsel for the JD submitted that the AO/RO ought to be set aside on the following grounds:

- (a) that there has been no act of bankruptcy committed by the JD on 23 September 2008 in view of his pending appeal to the Court of Appeal against the decision of the learned judge given on 9 September 2009. E
- (b) that the presentation of the CP was premature as the CP filed and presented on 12 March 2009 was based on a disputed BN which was yet to be decided by the court as at the date of the presentation, and as such there was no act of bankruptcy committed by the JD within six months before the presentation of the CP. F
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- (c) that the JD is still able to pay his debt within the meaning of s. 6(3) of the Bankruptcy Act 1967 (BA).

[5] The JC's Response

- (a) There are no grounds to support the appeal of the JD against the AO/RO granted by the SAR because:
 - (i) the cause papers were in order and no objection was raised by the JD at the hearing of the CP on the ground that no act of bankruptcy had been committed by the JD. I

- A (ii) the BN was properly served on the JD personally on 15 September 2008 and as the JD had failed to pay the sum stated in the BN or any part thereof within seven days of the service of the BN, the JD had committed an act of bankruptcy on 23 September 2008.
- B (iii) the JD was late in filing the summons in chambers to set aside the BN on 30 September 2008 ie, seven days after the act of bankruptcy had been committed and there was no extension of time for the compliance of the BN by the JD.
- C (b) There is no basis for the JD to contend that the time to comply with the BN had been extended to 9 September 2009, the date of decision of Zaharah binti Ibrahim J (now JCA).
- D (c) There is no evidence by affidavit that the JD is solvent and there is nothing before the court to show that the JD can pay his debt.

E **[6] Decision Of The Court**

Upon a consideration of the cause papers and written submissions and upon hearing the oral submissions of the counsel for the JD and JC, I held that there was no merit in the JD's appeal. Accordingly, the appeal (encl. 32) was dismissed with costs and the AO/RO were confirmed.

F **[7] Grounds For Decision**

G *Issue 1 - Whether The JD Had Committed An Act Of Bankruptcy On 23 September 2008*

- (a) The BN was served on the JD personally on 15 September 2008. The JD had a statutory period of seven days to respond.
- H (b) In order to avoid an act of bankruptcy being committed by 23 September 2008, the JD had either to settle the sum claimed in the BN to the satisfaction of the JC or to take action to set aside the BN within the seven days. The JD did not make any payment to the JC within the seven days.
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(c) The JD could apply to set aside the BN by one of two modes: A

- (i) By way of an affidavit-application under r. 95 of the Bankruptcy Rules 1969 (BR) to challenge the validity of the BN. B

Rule 95 provides:

- (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known. C
- (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined. D

A JD when filing an Affidavit-application under r. 95 BR must satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid of which he could not set up in the action in which the judgment was obtained. The JD has also to comply with the time limit of seven days prescribed in s. 3(1)(i) BA. E F

or

- (ii) By way of a summons in chambers supported by an affidavit in support under r. 18 BR to set aside the BN on the ground that it required him to pay a judgment debt otherwise than in accordance with the terms of the judgment. G

Rule 18 is as follows: H

- (1) Except where these Rules of the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit. I

- A (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.
- B (d) Counsel for the JD contended that while an affidavit-application under r. 95(1) BR must be filed within seven days of the date of service of the BN on the JD, there is no similar requirement that an application by way of a summons in chambers under r. 18(1) BR should also be filed within seven
- C days from the date of service of the BN. And that as an application had been filed to set aside the BN, the time for compliance of the BN had been extended till the summons in chambers was heard and disposed off.
- D (e) In support of her contention, counsel for the JD relied on the case of *Natarajan Kuppusamy, Re* [1992] 3 CLJ 1638; [1992] 3 CLJ (Rep) 111. In that case it was held by VC George J (as he then was) that:
- E in the face of the language used by rule 95(2) of the BR, and the prevailing practice, where the rule 95(1) affidavit is filed before the expiry of the statutory 7 days given by the bankruptcy notice, the time for compliance of the notice is to be deemed to have been extended until the application has been heard and determined and where before the period for
- F compliance with a bankruptcy notice has expired the alleged debtor files a rule 95(1) affidavit-application, no act of bankruptcy is deemed to have been committed until the disposal of the application, the filing of a petition before the disposal of the application purportedly grounded on non-
- G compliance with the Bankruptcy Notice is invalid.
- H (f) While I do not disagree with the decision and reasoning of VC George J (as he then was) in *Natarajan Kuppusamy, Re (supra)* and which case was followed by RK Nathan JC (as he then was) in the case of *Per Yap Kin ex parte United Malayan Banking Corporation Berhad* [1997] 3 CLJ Supp 56, I am of the view that the decisions in the two cases cannot apply to the present case as the application to challenge and to set aside the BN was filed by the JD not by an affidavit-application under r. 95(1) BR but by way of summons in chambers under
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- r. 18(1) BR. Counsel submitted that unlike r. 95(1) BR there is no provision in the Rules that the summons in chambers under r. 18(1) BR must be filed before the expiry of the seven day period and as such there was no delay when the summons in chambers was in fact filed on 30 September 2008. A
- (g) Generally, without an order for a stay of proceedings or an extension of time to comply with a statutory notice, the filing of a summons in chambers would not operate to stop time from running. In this case, even if the JD had filed the summons in chambers before the expiry of the seven day period but without an order for a stay of proceedings or an extension of time to comply with the BN, I am of the view that the mere fact that the JD had filed the summons in chambers would not operate to extend time for the JD to comply with the BN. This is simply because there is no equivalent provision in the BR that with the filing of a summons in chambers, no act of bankruptcy is deemed to have been committed until the disposal of the summons in chambers, unlike that provided for in an affidavit-application under r. 95(1). B C D E
- (h) Moreover, in this case the JD had filed the summons in chambers after the expiry of the statutory seven day period and no explanation was forthcoming to explain the delay nor was there an application to extend the time for compliance with the BN. F
- (i) In the Court of Appeal case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 at p. 116, Gopal Sri Ram JCA (as he then was) held that when determining an issue under the Bankruptcy Act, it is incumbent upon the court to accord its provisions a strict construction. Hence, conversely applying a strict construction in this case, it is a finding of the court that the JD had failed to comply with the BN by either paying the debt due or by obtaining an extension of time to comply with the BN. G H
- (j) As the act of bankruptcy was committed by the JD on 23 September 2008, the filing of the CP on 12 March 2009 that is, three months before the disposal of the summons in chambers to set aside the BN was heard by the SAR on I

- A 23 June 2009 is valid. The CP filed on 12 March 2009 was properly filed within six months from the act of bankruptcy committed on 23 September 2008. In light of the chronology of events, the hearing of the CP on 14 June 2010 and the grant of the AO/RO by the SAR were therefore not premature.
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Issue 2 - Whether There Is An Act Of Bankruptcy In View Of JD's Pending Appeal To The Court Of Appeal

- C (a) On 8 October 2009 the JD filed a Notice of Appeal against the decision of Zaharah binti Ibrahim J (now JCA) dismissing the appeal by the JD against the order of the SAR dismissing the application to set aside the BN.
- D (b) At all material times, the JD did not obtain any order for a stay of the bankruptcy proceedings pending his appeal to the Court of Appeal. It is trite law that an appeal does not operate to stay proceedings. The learned judge had held that the BN was valid as the service of the BN was proper and that the BN was in accordance with the judgment of 30 June 2005. Accordingly, the act of bankruptcy was committed on 23 September 2008.
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- F (c) With respect, I found it difficult to accept the argument by counsel for the JD that in the alternative, the act of bankruptcy was only committed on 9 September 2009, the date on which the learned judge had dismissed the JD's appeal. There is no basis for the court to consider this date and none was proffered by counsel. The date of 9 September 2009 is irrelevant in this regard.

G *Issue 3 - Whether The JD Is Solvent*

- H (a) The JD urged the court to exercise its power under s. 105(1) BA to annul the AO/RO on the ground that the JD is still able to pay his debt within the meaning of s. 6(3) BA. It is again trite that before the court can exercise its discretion in any matter there must be a basis for it to do so. In this case on the issue of solvency there are two reasons why the AO/RO ought not to be annulled namely:
- I (i) there was no evidence adduced in court by way of affidavit to show or to satisfy the court that the JD can pay the debt of RM3,342,208.41 as stated in the BN.

(ii) on the hearing of the CP on 14 June 2010, the JD did not object to the granting of the AO/RO after the SAR had dismissed the JD's summons in chambers to set aside the CP. A

[8] For the reasons above stated the appeal by the JD against the AO/RO granted by the SAR on 14 June 2010 was dismissed with costs. B

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